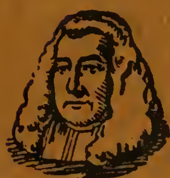
Price Standardization

Modern American Law Lecture



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PRICE STANDARDIZATION

BY

GEORGE SUTHERLAND, LL.D.

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George Sutherland is of Scotch-English descent, born in Buckinghamshire, England, 1862. Was educated in schools of Utah and law department, University of Michigan. Was admitted to the bar in 1883, and has been in the active practice of his profession ever since except while a member of the United States Senate.

He was State Senator in the first legislative assembly after the admission of Utah as a state in 1896, serving as chairman of the Judiciary Committee in that body. Was elected to the House of Representatives of the 57th Congress in 1900. After serving one term declined renomination; was elected United States Senator in 1905 and was reelected in 1911, his term of office expiring March 4th, 1917. Was chairman of the Federal Commission on Workman's Compensation in 1912-13. Was a member of the joint committee which prepared the existing Criminal Code and Judicial Code of the United States. (Served, among other Senate Committees, on Judiciary and Foreign Relations.) Received degree of Doctor of Laws from Columbia University, New York, and also from the University of Michigan. Was President of the American Bar Association for the year 1916-1917.

Along with his other activities, Mr. Sutherland has found time to take an active part in the investigation and discussion of current problems affecting business. Price Standardization has been a much mooted subject and the reader will find herein a comprehensive discussion of the topic from all angles.

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INTRODUCTION

As business grows in volume and complexity, the problem of determining when and how far competition should be restricted and regulated, and when it should be left entirely free, increases in difficulty. That "Competition is the life of trade" has hitherto been regarded as an economic truism, accepted by courts, as the governing principle of judicial decision, and by legislatures, as the guiding rule for legislative action. The axiom lies at the basis of our anti-trust laws—State and Federal. The State and inferior Federal courts have recognized few exceptions to the rule that price fixing by general agreement or understanding is unlawful, and the Supreme Court of the United States, in recent decisions, has eliminated these exceptions almost to the vanishing point. The rule, as applied to unbranded or otherwise unidentified goods, is perhaps not challenged by any one, but there is a very wide sentiment that, as applied to "identified" goods, the rule has been pushed too far and is econom-

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ically unsound. This has given rise to a demand for legislation which will legalize, under certain conditions and restrictions, the fixing and maintenance of prices of goods of this character.

The discussion of the matter has not only been widely extended, but is becoming highly controversial, if not acrimonious. The controversy, in the main, has centered about the so-called Stephens-Ashurst Price Maintenance Bill (originally introduced in the 63rd Congress, and known as the Stevens Bill), to which I shall have occasion to refer further along.

THE MEANING AND SCOPE OF PRICE STANDARDIZATION

The purpose of price maintenance—or standardization—is to enable the manufacturer or producer of a given article to control the price for which the article shall be sold by the retailer to the consumer. The advocates of the system do not claim that it should apply to all articles of trade, but only to such as are identified by patent, copyright, distinctive trade mark or other device, so as to clearly set them apart from all other articles of the same kind or class. For example, if a manufacturer engaged in making a special sort of breakfast food, disposes of it to the jobber or retailer in bulk, with nothing to distinguish it from other breakfast foods of the same kind, he may not fix the price at which it is to be resold to the consumer; but, it is contended, if he puts it up in packages bearing a special brand, or trade mark, as "Quaker Oats" or "Hecker's Cream of Wheat," he should be allowed to control the price at which the retail dealer shall sell

it to his customers. In the same way, it would seem, if apples are put on the market in the ordinary way, an agreement between producer or wholesaler and retail dealer that they are to be sold only at a stipulated price, would be legally and economically objectionable, but quite otherwise if the apples be put up in separate packages or cartons bearing a distinctive mark or brand. Indeed, the distinction, once admitted, will hold good as to practically every article of commerce. The question, therefore, becomes one of vast importance, since it potentially affects the entire field of mercantile distribution.

The subject naturally presents itself from two general points of view, first, from the legal and, second, from the economic standpoint, and these will now be considered in their order.

I

THE LEGAL ASPECT OF PRICE STANDARDIZATION

Common law rule.—Under the common law, as it came to us from England, all contracts in unreasonable restraint of trade were absolutely void. In the earliest English cases dealing with the subject, the doctrine seems to have been maintained that any restraint whatsoever was invalid. There is an interesting case which arose in the time of Henry V (1414), where a weaver had impulsively bound himself for a small consideration not to follow his craft within the town for a limited time. Subsequently, and before the expiration of the time, his necessities sent him to the loom; whereupon, an action for damages was brought

on the bond. Not only was the obligation held to be void but apparently the participation of the plaintiff was thought to be criminal, the learned judge who decided the case, with a somewhat startling display of feeling, saying:

"The obligation is void as being contrary to the common law and by God if the plaintiff were here he should go to prison until he paid a fine to the King." Diers Case, 2 Henry V, p. 5, pl. 26.

The strictness of the ancient rule was, however, modified by later decisions, beginning in the 17th century with the case of Mitchell v. Reynolds, 1 Peere Williams 181, where, however, Parker, C. J., referring to Diers Case, approves the indignation of the Judge, "tho' not his manner of expressing it." At the time of the Revolution the rule had become firmly established in accordance with the statement made above, and was adopted by us along with the other doctrines of the common law.

Subsequent development of rule.—The subsequent development of the law, both in England and the United States, has been influenced, to a greater or less degree, by two partially antagonistic considerations (1) the freedom of contract, that is, the right of the individual to determine for himself the agreements he shall make, and (2) the doctrine of free competition, which regards any restraint upon trade with jealousy. The rule with relation to restraints of trade has been relaxed, or contracted, according to which of these two considerations has exercised a controlling influence on the mind of the tribunal dealing with the subject. Until recent years, at least, our own courts

and legislative bodies seem to have been led by the second, rather than by the first, of these considerations. There are indications, however, that, so far as legislation is concerned, the pendulum has begun to swing in the other direction, as evidenced by certain provisions of the Clayton Anti-Trust law, the Trade Commission law and other enactments.

It is not necessary to enter upon a discussion of the development of the law relating to the general subject of restraint of trade, since we are now dealing with the question only so far as it affects the maintenance of prices of identified goods, the law concerning which is a matter of quite recent growth. The question which is presented is, "Do contracts or other arrangements which seek to fix prices at which identified goods must be sold by retail dealers to consumers fall within or without the rule which forbids unreasonable restraints of trade?"

ELEMENTS AFFECTING QUESTION

The legal question may be affected by the method under which prices are sought to be standardized, that is whether by contract or by notice, or other contrivance not involving an agreement between the producer and the retailer. These methods may be summarized as follows:

1. The producer of the given article formally agrees with the retail dealer that the article shall be sold only at a specified price, or with the jobber or middleman, that he shall furnish the article only to such retail dealers as will sell at the specified price.

2. The producer stamps or prints the retail price

upon the article or upon a label attached thereto, or otherwise gives notice that the article is to be sold only at the specified price.

3. The producer does not attempt to bind the dealer to maintain any specified price, but makes it worth his while to do so by giving rebates or other valuable inducement.

4. The producer attaches to the article a notice that if it be sold for less than the specified price, the manufacturer's name must not be used in connection with the article, but must be erased or eliminated therefrom.

5. The producer markets the goods through selling agents, or agencies, retaining title in himself.

6. The producer seeks to bring about the result indirectly, by requiring the retailer to sell at the fixed price and, if he fail to do so, refusing thereafter to furnish him with goods.

There are four general classes of articles falling within the description of identified goods which have been considered in dealing with the legal side of the problem: (a) Articles protected by patent; (b) articles protected by copyright; (c) articles manufactured under a secret process or formula, and (d) articles put out under a trade mark or special mark or brand.

PRICE MAINTENANCE BY CONTRACT

The attempt to standardize prices by contract may be made either by a single contract between the manufacturer and the dealer, whereby the dealer agrees to sell at the stipulated price, or by a "system" of

contracts made with all or a large number of jobbers or dealers, so as to control prices generally and restrain competition. I do not know of any case which holds that a single contract made between the manufacturer and a retail dealer, by which the latter is bound to sell only at a fixed price, is unlawful. There would seem to be no view of the rule against restraints of trade which would render such an agreement obnoxious to the principle of that rule. The scope and effect of such a contract are so limited and the consequent restraint so slight, that it can hardly be said to be an *unreasonable* restraint. However, such a contract is binding only upon the parties to it. The rule with reference to restraints upon the alienation of real property does not apply to personal property, except when of an unusual character, such as an heirloom; hence, the subsequent purchaser at a less price than that fixed by the contract would not be affected.

The discussion which follows, therefore, is with reference to a situation involving a "system" of contracts, or amounting to a combination or general scheme to maintain prices. The means by which such a result is sought would seem to be immaterial, for as said by the Court in Brent v. Gay, 149 Ky. 615, 626: "And so taking for a foundation the principle that illegal and unreasonable restraint of trade is obnoxious to the spirit of the law, the range of this principle will be extended to meet the requirements of today and to embrace every condition in which an unlawful attempt is made to restrain trade and control the market and suppress competition by *whatever means these ends are sought to be accomplished.*"

The English Rule

It is to be observed, in the first place, that the development of the law relating to restraints of trade in England and in the United States, has not proceeded along altogether parallel lines. As already stated, our courts and legislatures have been influenced by the theory which teaches the great desirability of competition. On the other hand, the English courts seem to have given more weight than we to the doctrine of *laissez faire*—the freedom of contract—the right of the individual to govern his private affairs in his own way. The general tendency, therefore, of the English cases has been in the direction of relaxing rather than of making more rigid the rule against restraints of trade. Contracts are upheld by the English judges which would be declared unlawful in this country. We should, therefore, expect to find that the English courts have dealt less strictly than our own with attempts by contract or otherwise to fix and maintain prices. In Elliman Sons & Company v. Carrington & Son Ltd., 2 Ch. Div. (1901) 275, there was involved an agreement by which the defendant was bound not to resell the goods (proprietary or so-called "patent" medicines) purchased from plaintiff at less than a fixed price and, if resold to the trade, to secure an agreement with the retailer that he would not sell at less than the stipulated price. Upon an action for the breach of the latter condition, the court held the contract valid. There are other English cases to the same effect, and the rule seems to be established that such contracts are not in illegal restraint of trade.

With regard to patented articles, the same doctrine is maintained where the restriction as to resale price is sought to be imposed by notice as distinguished from contract, National Phonograph Co. v. Menck (1911) 104 L. T. 5.

In Incandescent Gas Light Co. v. Cortelo, 12 Pat. Cas. 262, the Court said: "Inasmuch as he has the right to prevent people from using them or dealing in them at all, he has the right to the lesser thing, that is to say, to impose his own conditions. It does not matter how unreasonable or how absurd the conditions are."

But the rule is otherwise as to non-patented articles. In such case a restriction sought to be imposed by notice cannot be enforced, Taddy & Co. v. Sterious (1904) 1 Ch. 354; McGruther v. Pitcher (1904) 2 Ch. 306.

The distinction was recognized in National Phonograph Co. v. Menck, *supra,* where the court, speaking of ordinary goods as distinguished from patented articles, said: "The owner may use and dispose of these as he thinks fit. He may have a certain contract with the person from whom he bought and to such a contract he must answer, simply, however, in his capacity as owner; he is not bound by any restriction in regard to the use or sale of the goods, and it is out of the question to suggest that restrictive conditions run with the goods."

The American Rule

While some of the decisions in the State and lower Federal courts have followed, approximately, the

English rule, the general trend is in the direction of a more rigid interpretation of the restraint of trade doctrine, as applied to price fixing and maintenance. These decisions naturally separate themselves into those dealing with articles protected by patent, those protected by copyright, and those put out under special brands or trade marks or otherwise identified, including such as are made under secret process or formula.

Articles protected by patent.—Prior to the decisions of the Supreme Court of the United States, hereafter referred to, the rule seems to have been well established in the lower Federal courts that the patentee might lawfully impose restrictions, not only respecting the *use* of his invention, but also upon the *price* at which it should be resold, and that such restrictions would be binding upon the dealer with knowledge, or upon one who had entered into contractual relations under which he had become bound to maintain the stipulated prices. It was held that a sale at a less price than that fixed by the owner of the patent, constituted an infringement of the patent, which would sustain an action in tort, and, where the restrictions were the subject of contract, an action for breach of contract as well. In either case, it was said, the rule of the common law respecting monopolies and restraints of trade had no application, since the purpose of the patent was to give the patentee an exclusive monopoly in making, using, and vending the patented device. The first case announcing this doctrine was Edison Phonograph Co. v. Kaufmann, 105 Fed. Rep. 960, where it was held that the act of selling

at less than the fixed price constituted an infringement of the patent. This case and later cases to the same effect, proceeded upon the theory that the patentee had the statutory right to condition the *use* of his device, and the limitation upon the resale price constituted such a condition. The cases are reviewed by Judge, afterward Justice, Lurton, in John D. Park & Sons Co. v. Hartman, 153 Fed. Rep. 24, 27-28, and the conclusion reached that "contracts restraining subsequent sales or use of a patented article which would contravene the common law rules against monopolies and restraint of trade, if made in respect of unpatented articles, are valid because of the monopoly granted by the patent."

The decisions of these Federal courts have, however, been completely upset by the Supreme Court of the United States. In the case of Henry v. Dick Co., 224 U. S. 1, that court distinguished the patent law from the copyright law, in respect to the "use" of the thing which is the subject of the patent or copyright; in the former, the patentee being given the exclusive right of "use," in the latter, no such right being accorded. In that case a patented mimeograph which had been sold, bore a printed notice that it was to be used only with ink and other supplies made by the owners of the patent. Bauer & Co., with full knowledge of the restriction, sold to the purchaser a can of ink suitable for use and intended to be used with the machine. The court held this to be an unauthorized interference with the right of exclusive "use" and an infringement of the patent.

Subsequently, there came to the Supreme Court

a case involving the right of a patentee to limit by notice the *price* at which the patented article might be sold by a retailer, the full price therefor having been paid to the agent of the patentee, Bauer v. O'Donnell (The "Sanatogen" Case), 229 U. S. 1.

The opinion, delivered by Justice Day, four Justices dissenting, points out the distinction between the right of exclusive "use," involved in the Dick case, and the right to dictate the *price* at which subsequent sales shall be made, and holds the attempted restrictions to be futile. The rule established by this case is that the patent law gives the patentee the *exclusive right to sell:* it does not give him the right to control the price at which *another* shall sell, who has, by purchase, acquired the full title to the patented article. The case does not hold that the patentee who sells the exclusive *right to sell,* as distinguished from the *article* itself, may not restrict the price and this would seem to be a lawful exercise of his rights under the patent law. The distinction is pointed out in Ford Motor Co. v. Union Motor Sales Co., 225 Fed. Rep. 373, 379, which case also holds (p. 383) that the rule established by the "Sanatogen" case, applies to price restrictions attempted by notice, by contract, or in any other way. The very full effect thus given to this decision is not conceded by other Federal judges. See American Graphophone Co. v. Boston Store, 225 Fed. Rep. 785, 787, where it is held that there is no real distinction between a sale of the right to sell and the sale of the article with terms of resale, and consequently that the agent or vendee of the patentee may, by "direct agreement," be bound

to observe the price restriction, imposed as a condition of the sale.

Articles protected by copyright.—The decisions of the inferior Federal courts left the question respecting the legality of attempts to fix and maintain prices of copyrighted articles in some confusion. In the case of Park & Sons v. Hartman, *supra*, Justice Lurton, while clear in his statement of the law applicable to patented articles, said, "There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes, that the cases which relate to the one subject are not altogether controlling as to the other." He, however, adds that the copyright statutes would seem to take "direct contracts" between publisher and vendee in respect to price outside the rule as to restraints of trade which might otherwise apply. In Bobbs Merrill Co. v. Straus, 210 U. S. 339, the Supreme Court held that the owner of the copyright had no right by virtue of the copyright act to impose *by notice,* a limitation of price at which a book should be resold. In Straus v. American Publishing Association, 231 U. S. 222, the court went further and said that the copyright act, no more than the patent statute, was intended to authorize *agreements* in unlawful restraint of trade, etc. This case involved a combination of booksellers to sell copyrighted books to those only who would maintain the retail price.

Identified goods not patented or copyrighted.—As to proprietary articles, or articles made under secret

process or formula, the decisions in the lower Federal courts were conflicting, the majority apparently holding that the rule with reference to patented articles should apply. Justice Lurton in Park & Sons Co. v. Hartman, *supra,* vigorously contending to the contrary, held that a "system" of contracts by which the manufacturer of a medicine made under a secret formula, not patented, undertook to maintain uniform prices, was invalid. In Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, the Supreme Court followed the view of Justice Lurton and held such an arrangement void both at common law and under the Federal Anti-Trust Act, Mr. Justice Holmes alone dissenting. Mr. Justice Hughes, in delivering the opinion of the Court, said that where "commodities had passed into the channels of trade and are owned by dealers, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

The case of the United States v. Kellogg Toasted Corn Flakes Co., 222 Fed. Rep. 725, was decided soon after the last mentioned decision, and it was there held that a manufacturer of a product in a patented carton, in connection with an absolute sale, could not control the price at which the package should be subsequently resold by the jobber or retailer, "without regard to the garb in which the acts were clothed."

Summary

It may therefore, I think, be regarded as definitely settled by the decisions of the Supreme Court that no systematic attempt to fix prices by agreement, under-

standing, or otherwise can be made effectual; but every such effort is invalid both at common law and under the Anti-Trust law, whether the article affected be protected by patent or copyright, manufactured under secret process or formula, or be put out under trade mark, special brand or other identification.

Rebates and Other Inducements

When, however, the arrangement takes the form of a mere *inducement* to the retailer to observe the prices fixed by the manufacturer it would seem not to be unlawful, though affording no basis for an action if disregarded, In re Green, 52 Fed. Rep. 104.

In this case it was held that a promise to pay retailers a rebate to maintain the prices fixed by the manufacturer was not unlawful. The article involved was distilled alcohol, probably not "identified." The opinion was delivered by Jackson, Circuit Judge, who held, first, that the means adopted did not constitute a "contract, combination, or conspiracy in restraint of trade," but simply an inducement to the dealer not to sell at a price less than that fixed, which he was at liberty to accept or disregard. It was further said, however, that if the arrangement could be construed as a contract it could not be held to be in illegal restraint of trade, because the restraint was not general but partial, proceeding upon proper consideration and only securing to the manufacturer a reasonable protection to his business. There are cases in the State courts to the same effect, upholding, under the circumstances shown, the giving of rebates. See for example, Walsh v. Dwight, 58 N. Y.

Supp. 91, where it was held that an agreement by a manufacturer to give his customers a rebate if they should refuse to sell his goods and similar goods at less than a certain price, was not in restraint of trade. These cases may be regarded as authority for the proposition that a unilateral arrangement which simply operates to "induce" the dealer to maintain the manufacturer's price is not unlawful.

Selling Through Agents

The manufacturer may of course sell his goods through agents, in which case he may legally fix and maintain prices exactly to the same extent as though he were personally making the sale. This is elementary.

Refusing to Sell to One Who Cuts Prices

The owner of property may of course sell or refuse to sell as he pleases. He may sell to one and refuse to sell to another. And this he may do for a good reason, a bad reason, or no reason at all. It has consequently been held that a trader may lawfully refuse to sell to one who cuts his prices, The Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. Rep. 46, affirming 224 Fed. Rep. 566.

STATE COURT DECISIONS

The decisions of the State courts bearing upon the question are very numerous, and no comprehensive review of them will be attempted. Many of them deal with the subject of rebates or single contracts, about which, as we have seen, there is no dispute. There is, in addition, a line of cases which deal with

the subject in its broader aspect, and which agree upon the general conclusion that subject to certain conditions, contracts made by the manufacturer of "identified" goods with retail dealers therein, binding them to sell at stipulated prices, are not invalid but are legal and enforceable, provided the arrangement does not create or tend to create a monopoly. Thus it was held in Grogan v. Chaffee, 156 Cal. 611, that a manufacturer of olive oil, in quantity relatively small compared with the total production, may sell his oil on condition that it shall be resold at a fixed minimum price; that the contract will be enforced, and it is immaterial, as between the parties, whether the article is produced under patent or secret formula. It did not appear that plaintiff produced any large proportion of the olive oil sold in the market and the Court held that there was nothing in the situation tending to create a monopoly. Whether the price restriction could be enforced under notice is not decided, though the Court suggestively refers to a Massachusetts case (Garst v. Hall & Lyon Co., 179 Mass. 589), which holds that the price restriction does not extend to a subsequent purchaser with knowledge of the restriction, but who has made no agreement to observe it. This case is followed by Ghirardelli v. Hunsicker, 128 Pac. 1041, where it is held that the manufacturer of a certain kind of chocolate could legally impose his price restrictions upon retail dealers who purchase from a wholesaler, bound to contract for the benefit of the manufacturer, with whom the retailers make price maintenance agreements.

There is an elaborate opinion to the same effect by the Washington Supreme Court in Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, where it is held that a contract between a manufacturer of a special brand of flour and retailers, requiring them to maintain selling prices, was valid; since under the facts shown, it did not tend to control the market or create a monopoly or restrict competition. The opinion is most instructive and discriminating and should be read in full. See also Commonwealth v. Grinstead, 111 Ky. 203; Garst v. Harris, 177 Mass. 72; Garst v. Charles, 187 Id. 144; Walsh v. Dwight, 58 N. Y. Supp. 91.

Rule Established by State Cases

These cases taken together seem to establish that the tests to be applied to contracts of this kind are: (1) whether the stipulation as to price maintenance is of an ancillary nature, that is, not primarily imposed to raise prices but to protect the business of the manufacturer; (2) whether it affords no more than reasonable protection, and (3) whether, on the whole, the injury to the public, by the restraint on competition, is slight in comparison with the legitimate benefit afforded to the manufacturer. These questions being determined in the affirmative, the agreements are valid, whether the product affected be produced under secret process or formula or not, and whether made directly with the retailer or through a jobber or middleman.

Some of the recent state decisions seek to distinguish the cases decided by the Federal Supreme

Court, by pointing out that they dealt with articles not capable of general production, as in the case of "Sanatogen," a proprietary article produced by a single manufacturer; while in the state cases the production of the articles under consideration was not so confined, the manufacturer simply putting out his contribution to the general supply under a special trade mark or brand. In other words the distinction, pointed out, is between a special *product* produced by a single manufacturer and a special *brand* of a product produced generally. In the first case, the result of price fixing is to monopolize the market in respect of the *product,* while in the second case, the monopoly is of the *brand,* leaving competition as to the product in full play. Whether the Federal Supreme Court will recognize any such distinction is at least doubtful, in view of the sweeping language of the opinions thus far rendered. In a few States price maintenance contracts have been legalized by statute.

The Necessity for Federal Legislation

The commerce of our day has become so extensive and state lines have been overflowed so completely, that state laws and state decisions upon the subject of price maintenance are of comparatively small concern; the rule established for interstate commerce is all important. Hence the far reaching consequences of the recent decisions of the Federal Supreme Court referred to in the foregoing. Under these decisions, it would seem to be impossible for manufacturers of "identified" goods of any sort to standardize prices by any effective method, in the absence of enabling

legislation by Congress. The *agency* system cannot be followed, except by manufacturers having very large capital and able to engage in distributing their products upon a large scale. The *rebate* system lacks the element of enforceability and, therefore, of certainty. The attempt to maintain prices by refusing to make subsequent sales to recalcitrant dealers, will produce only partial and haphazard results. The demand of those who favor the policy of price standardization and who challenge the economic wisdom of the Supreme Court decisions is, therefore, for legislation which will recognize the policy and legalize contracts, notices or other effective means for carrying it into operation. This brings us to a consideration of the second branch of the subject.

II

ECONOMIC PHASE OF PRICE STANDARDIZATION

Will Promote Competition Among Producers.

There are two ways by which the retail prices of specially branded goods may be fixed, (1) by the dealer who sells to the consumer, the tendency of which is to bring about free price competition among all the retailers, operating in a particular market, who deal in that special brand, and (2) by the producer of the special brand of goods, which results in a uniform retail price for the special brand, and brings, or tends to bring, about free price competition among the producers of the various brands of goods of the same kind. The tendency of the first method, it is claimed, is really in the direction of monopoly, since the small

manufacturer is unable, under existing laws, to standardize his prices by contract or notice, while the large manufacturer is able to standardize his prices by becoming his own distributor under the agency system; and inasmuch as the latter system requires great capital, the tendency will be steadily in the direction of handing over the markets to the very large, and, consequently, to a few, producers. Thus competition will decrease instead of increasing. The proponents of price standardization insist that the competition which is of most benefit to the public is that of excellence, or, as stated by Judge Ellis in Fisher Flouring Mills Co. v. Swanson, *supra:* "The true competition is between rival articles, a competition in excellence, which can never be maintained, if through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles, at or above their reasonable price." This competition in quality is fostered by allowing the producer to control the retail price of his product, since its effect is to protect and steady the business and thus encourage others to enter the field of production of similar and competing articles, each put before the public under its own special brand. The standardization of prices by contract being illegal, the agency plan is the only effective alternative, and this will not only result in building up the big manufacturers and destroying the small ones, as it is claimed, but it will have the further effect, it is said, of gradually eliminating the small store keepers who

will be unable to stand against the agencies, chain stores and big department stores.

The negative view.—On the other hand, it is pointed out that thorough going competition—competition as to price, quality, terms and service—is the most effective way of preventing undue or extortionate prices and of furnishing to the public the most value for the least money. The cost of doing a retail business varies greatly not only as among different sections of the country but among retailers in the same locality. This difference varies, it is claimed, among grocery stores from 12 to 22 per cent; hardware stores, from 17 to 26 per cent; dry goods stores, from 16 to 25 per cent; shoe stores, from 16 to 27 per cent; men's clothing stores, from 20 to 30 per cent; drug stores, from 24 to 30 per cent; jewelry stores, from 25 to 32 per cent, and among department stores, from 22 to 30 per cent. If a general system of price maintenance be legalized, the effect will be to compel the most efficient retailers to sell at the same price as the least efficient, and the incentive to constantly increasing efficiency with its contributing effect toward price reductions will be taken away or greatly lessened. The power to fix retail prices will enable the manufacturer to determine the profits of the retailer; to cut him off with a nominal profit or give him a very large profit and prevent him from giving the public the benefit of any part of it by accepting a reduced but entirely adequate and, to him, satisfactory profit for himself. Under such a system the retail store, so far as identified goods are concerned, will lose its initiative and become, in effect, a mere distributing agent. The ri-

valry between competing retailers, which induces each to struggle for customers by selling his goods as cheaply as possible will be gone, with a consequent loss of business efficiency. Instead of the small manufacturers being helped by legalizing price maintenance by contract, the reverse, it is insisted, would be the case. Price standardization and national advertising go hand in hand, and in a contest of publicity, requiring the expenditure of large sums of money, the small manufacturer would be hopelessly beaten by the large and wealthy. The tendency would, therefore, be, it is urged, in the direction of eliminating the small producers, with the consequent development of monopolizing aggregations and an ultimate rise in prices for identified goods. So it is denied that there is any danger from the present situation, that the small retailers will be driven out of business or injuriously affected. It is pointed out that the chain stores, the great department stores and the small shops have each developed in response to an economic need; that they exist side by side and each has its definite function, and in certain fields, neither can invade the province of the other. The large store it is conceded buys in large quantities and therefore more cheaply; but the small store is in close touch with local patrons, is operated by the owner directly, is located where rents are comparatively cheap, is able to enforce economies of various kinds or is favored by other circumstances which are not enjoyed by the large dealer. This general situation and these differences will continue, it is contended, in spite of the further growth of distributing agencies, chain stores and department stores.

Producer, in Absence of Fixed Prices, Competes with Himself

The advocate of price standardization, however, contends that price competition among retail dealers in identified goods is in effect competition of the producer with himself. The very fact that the article is specially branded shows that it is already entered by the producer in a competitive market, where his special brand must contest for the favor of the consuming public against other goods of the same kind, whether specially branded or not. Whether a given article shall succeed in this contest depends upon the comparative quality and price. The producer controls the quality and is influenced from motives of self-interest to make it as good as possible, since one of the determining factors in the competitive struggle, in which his product must engage, will be its superior quality. In like manner he may be trusted, from like motives, to fix the price as low as possible, since that will constitute the other determining factor in the struggle for trade. In such a situation monopolistic prices are impossible, and it is pointed out that in fact hundreds of specially identified articles are in the markets of the country being sold at standard uniform prices—as, for example, certain brands of collars, shirts, hats, toothbrushes, breakfast foods, automobiles, etc—without the slightest tendency toward monopoly being developed.

Price Standardization Will Improve Quality

It is also claimed that standard prices upon identified goods will have a strong influence upon the quality in another way. If retail dealers cut the price

back and forth to the point of demoralizing the market for the given article, intending purchasers will be induced to take a substitute, the producer will be urged to reduce his prices, and, in order to do this, the quality will be impaired, and in the end the public will gain nothing.

Contrary view.—On the other hand, it is not clear that price maintenance actually does result in keeping up the quality. Instances are not wholly unknown, where, upon the introduction of some special brand of goods, and for some time thereafter, the quality has been excellent, but after the trade has been secured and the confidence of the public established, the quality has been allowed to deteriorate. It is denied that there is any well defined tendency to superior quality in the case of branded merchandise, but on the contrary, it is asserted that the tendency is the other way, due to the fact that the branded article must bear a large overhead expense for advertising which is not the case with unbranded merchandise. The legalizing of price standardization contracts would greatly increase the number of specially branded articles, with a consequent addition to the volume of national advertising, the burden of which would be borne by the consuming public, either in the form of increased cost or impaired quality.

Market Demoralized by Cutting Prices

Again it is urged by the advocates of price standardization, that to allow retailers to fix prices on branded goods, will result in constantly fluctuating prices; rendering the market unstable; preventing dealers

from carrying adequate stocks, for fear of not being able to meet the prices of competitors; inducing customers to go from one store to another, in order to find the cheapest; resulting in the unprofitable increase of sales forces, loss of time, etc. As a result the market will become demoralized, dealers will refuse to handle the branded article, and in the end, society will lose more than it will gain by the reduction of prices.

This claim denied.—On the other side, it is pointed out that there are many patented and branded articles, the resale of which has never been fixed by the manufacturer, but has been left entirely to the retail dealers, yet no demoralization has resulted. Goods of this character, as well as unidentified goods, have been distributed in the same manner as have identified goods, upon which retail prices are fixed, and differences in results have not been manifested. Under a system of free competition among dealers, economies, resulting in lower prices, are encouraged; under price standardization, the public will be denied all benefit from these economies.

Cut Prices as "Bait" to Induce Buying of Other Goods

On behalf of the policy of price standardization it is asserted that it is the practice of many large retail establishments and department stores, to advertise one or more branded articles for sale at a price under, and sometimes very much under, the retail price fixed by the manufacturer, for the purpose of inducing intending purchasers to believe that similar reductions have been made upon other goods, advertised at the same time, upon which there is no standard price. In

this way, it is asserted, the public is victimized, and while it may profit by the reduction upon the particular branded article, this is more than offset by the enhanced price it is betrayed into paying for other things. The quantity of the standardized goods which each customer may buy is generally limited, and is usually of a kind well known in the community, upon which the selling price has been long fixed and widely advertised. The psychology of such a situation is clear. It is an appeal to the customer to believe that, since the price has been lowered upon this article with which he is so familiar, prices upon other articles, with which he is not familiar, have been likewise lowered. The practice has been characterized as "cut throat merchandising," "fake advertising," "bait," and by other epithets. Here is the way it works out in practice according to the advocates of price standardization: A man sees, in a large display advertisement of reduced prices upon all sorts of men's apparel, that "Arrow" Collars are to be sold for twelve cents. He knows that the standard price is twenty cents, and determines to lay in a supply. Upon inquiry he may be informed that his size is not in stock, or the number he is allowed to purchase may be limited. Suppose, however, he buys half dozen at a saving of forty-eight cents. Influenced by his bargain, however, he buys several other articles for which he pays more than the usual price, and his saving on the well known article has been offset, or more than offset, by overcharges upon the other articles. He has thus injured himself, injured other dealers, who cannot afford to make the cut in price, and injured

the manufacturer, whose energy, enterprise, and expensive campaign of publicity has built up a reputation and a trade for the articles. The so-called "bait," it is said, is peculiarly effective in the case of women, who are natural bargain hunters. The tendency of price cutting is to drive the article out of the hands of small dealers by making it unprofitable to carry it, and the consumer, not being able to secure it readily, is induced to take an inferior substitute.

The negative view.—The opponents, however, argue that the consumer is distinctly benefited by the saving he is able to make on account of these reductions. That he, and especially "she," is not lured by the advertised reductions in price upon standard priced articles, to buy other high priced goods. That the average buyer is discriminating and is not misled in any such way as is claimed. That the practice is in any way dishonest, or intended as "bait," or expected to deceive intending customers, is strenuously denied. Price cutting of the character in question is simply a form of advertising. It brings, and is intended to bring, people into the advertiser's place of business, and amounts simply to a legitimate inducement to that end. Cut price advertising is general, but the attention of the average person is more instantly arrested by an advertisement of a reduced price upon some standard article whose general price is well known. The effect is to increase the sales of the standard article and thus help the manufacturer, who obtains his wholesale price in any event; to help the advertiser, by bringing more customers to his place of business, and increasing his trade; and to help the

customer, by giving him something at a less price than he would otherwise pay.

The Manufacturer's Interest

The manufacturer of this class of goods, it is urged, has a certain moral right to fix the prices at which they shall be sold. He advertises them widely at great expense, and it is he, and not the dealer, who really creates the market which the dealer enjoys. The public becomes used to the uniform price, and expects it, and becomes suspicious, if for any reason it is altered. The manufacturer is, therefore, bound to stand behind the price and does not advance it with increased cost of production, because it is to his advantage to retain the price with which the public is familiar. Cutting prices makes it difficult to sell again at the regular price.

The Opposing Interest of the Customer

But, it is said, on the other hand, if the manufacturer enforces a uniform price, every purchaser must pay the same wherever he may be or however he pays. The purchaser who lives next door to the factory must pay as much as he who is thousands of miles way, and he who pays cash and buys extensively must pay as much as he who gets credit and buys little. It is unfair to deny the customer the benefit of these inherent advantages.

Investigation of the Subject

The foregoing does not, and is not intended to, exhaust the arguments for and against the policy of

price standardization. These are so many and so copious that in the course of a discussion, such as this, they cannot be enumerated but only illustrated. The question has been the subject of repeated investigations on the part of the Committee on Interstate and Foreign Commerce of the National House of Representatives. The testimony, briefs and legal and economic arguments upon either side will be found in the hearings of the committee on H. R. 13305, 63rd Congress, February 27, 1914-January 9, 1915; on H. R. 13568, 64th Congress, May 30-June 1, 1916; and on the same bill, January 5-11, 1917.

III

PROPOSED FEDERAL LEGISLATION

The so-called Stephens-Ashurst Price Maintenance Bill was introduced in the 64th Congress (H. R. 13568; S. 5064) and has been reintroduced in the present Congress (H. R. 212) and is now pending before the House Committee on Interstate and Foreign Commerce. Briefly stated, it authorizes any grower, producer, manufacturer or owner of any article of commerce under trade mark or special brand, to prescribe, in any contract of sale thereof, the uniform prices and manners of settlement at which the different qualities and quantities may be resold, whenever the contract constitutes a transaction in foreign or interstate commerce. It provides that no vendor shall have any monopoly or control of the market for, or be a party to any price agreement, combination or understanding

respecting articles of the same general class as those covered by the contract of sale. Provision is made for filing with the Federal Trade Commission a statement of the trade mark or special brand, and, from time to time, a schedule of the uniform prices of sale to wholesale and retail dealers, "from whatever source acquired," and to the public. Prices are to be uniform "to all dealers in like circumstances differing only as to grade, quality, or quantity of such articles sold, the point of delivery and the manner of settlement," such differences to be set forth in the schedule. Discrimination is forbidden, in favor of any vendor "by the allowance of a discount, rebate, or commission or by grant of any special concession or by any device whatsoever."

Contracts may provide for "disposal sales at appropriate times," during which dealers may sell at other than the uniform prices, provided the articles shall have first been offered to the vendor, in writing, at the price paid by the dealer, and such vendor "not less than thirty days prior to the date set forth for the next sale, after reasonable opportunity to inspect such article or articles, shall have refused or neglected to accept such offer."

Provision is also made for sales without regard to the uniform price in case the dealer discontinues the sale of the article, or in the course of winding up his business, or if he becomes bankrupt or goes into the hands of a receiver, or if the articles become damaged, deteriorated, or soiled; provided, the vendor be given opportunity to purchase under conditions which are substantially the same as those prescribed

for disposal sales, or, in case of damaged goods, an opportunity to exchange for similar articles not damaged.

Sales to the United States, to State and public libraries, and to certain other institutions are excluded from the operation of the bill.

Objections to Proposed Law

Conflicting rule as to State and Interstate Commerce.—The provisions of the bill are confined to foreign and interstate commerce; necessarily so, of course, because of the limitations upon the Federal power. It is urged that this will result in great confusion, since articles moving in interstate commerce will be subject to one rule and those within the State to another rule. To this it is replied that the bill would in fact harmonize rules which at present conflict, since its provisions are now recognized law in the States. To the objection that the proposed law would mean a complete readjustment of business, it is answered that business has already been adjusted on the theory of the bill, and it is the decisions of the Supreme Court which threaten the only element of confusion.

Not sufficient to exclude monopolies.—The bill, it is urged, is not sufficiently definite to prevent its utilization for the benefit of monopolies. While it provides that the vendor shall not have any monopoly or control of the market, it will be exceedingly difficult to determine the status of the vendor in advance, and the government will be in constant danger of approv-

ing contracts and schedules where the vendor does in fact control the market. The bill excludes a vendor who has an agreement, combination or understanding with a competitor to maintain prices, but there is nothing to prevent competitors from filing identical or nearly identical price schedules, and the difficulty of showing any agreement or understanding would be very great. A more definite provision would seem to be necessary on this subject.

What is meant by "owner"?—The meaning of the word "owner" in the bill is not clear. Is it to be construed in connection with the other words "grower," "producer" and "manufacturer," who are all *originators* of articles, in accordance with the rule of statutory construction of associated words, as meaning only owners who are *originators,* or will it apply to anyone who owns an article? If the latter, then the jobber, or wholesaler, or indeed anyone is at liberty to adopt a special brand and enjoy the benefits of the proposed law.

Discrimination for benefit of favored dealers.—The bill provides that prices shall be uniform to all dealers "in like circumstances." The circumstances of no two cases are likely to be *precisely* alike and the phrase would probably be held to mean *substantially* like circumstances. There is here much room for the play of favoritism. So in the case of seasonal and other emergency disposal of goods, there is opportunity for favoring dealers. To these objections it is replied that it is always so much to the advantage of the producer to treat all dealers with fairness that discrimination, which has been of in-

frequent occurrence in the past, is not likely to make its appearance under this legislation.

Emergency sales too restricted.—It is pointed out that the course to be followed, before goods can be sold at less than the uniform price, is so troublesome and subject to such delay as to be practically unworkable. The loss to the dealer by delay in the case of seasonal, perishable or damaged goods may be very great.

It is said, however, in reply, that the bill is not mandatory and in those industries where emergency sales are necessary, resale prices would not be fixed, for fear dealers would not handle the goods, and that usually sales are planned sufficiently in advance to allow the delay contemplated by the bill, without hardship.

Discounts to dealers, none to consumers.—The bill allows discounts to dealers based upon grade, quality, etc., but none to customers for like causes. It is said, however, that there are other ways in which the dealer can give his customers the benefit of legitimate preferences for these or like causes without establishing the undesirable practice of price discrimination in the case of small consumers of staple products.

Other objections are urged; among them, that the provisions for fixing retail prices by filing schedules puts too much power into the hands of the producer, and that provision should be made for some method by which it may be determined that the prices are no greater than necessary for the protection of the producer.

CONCLUSION

If it is finally deemed advisable to authorize, by legislation, the fixing and maintenance of uniform prices upon identified goods, the Stephens-Ashurst Bill, in its general scope, affords a reasonable and fair foundation. Before its enactment into law, the foregoing objections should be carefully considered. Stronger and more definite provisions should be inserted to guard against monopoly or market control; to prevent discrimination in favor of one retailer to the injury of another; to clear up the ambiguity as to whether the bill applies to price fixing by notice as well as by contract; to simplify the seasonal and other emergency sales of uniform price goods; and to insure the fixing of retail prices within the limit of necessary protection to the producer.